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Democrat-appointed judges vote for Obamacare 90 percent of the time

Appointees of Democrats, Republicans act predictably in health care law court challenges

By Tom Howell Jr.
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Predicting whether Obamacare survives its latest battery of court challenges could be as easy as looking at the judges making the decisions — and the presidents who appointed them.

A Washington Times analysis of the votes cast by dozens of federal judges in appellate courts since the 2010 law was enacted shows that while Democratic and Republican appointees were evenly represented in the cases, they differed dramatically in how they ruled.

Democratic appointees ruled in favor of Obamacare more than 90 percent of the time, while Republican appointees ruled against it nearly 80 percent of the time.

Legal scholars said that's not so much a result of party labels as that those labels represent competing judicial philosophies, which is what's playing out in the rulings.

“When the result is that judges appointed by each party issue opinions that promote that party's political goals, it can appear that the judges are trying to promote ‘their’ party's political ends, even though that is not what's happening,” said Michael F. Cannon, director of health policy at the Cato Institute and chief architect of a lawsuit that challenges where Obamacare's subsidies may flow.

A review of substantive federal appellate opinions through August 1 shows that since 2011, only two of the 30 Democratic-appointed judges or justices to rule on the merits of a case decided against Obamacare. Among Republican nominees, just six of the 28 to rule backed Mr. Obama's health law.

Judge Jeffrey Sutton, a George W. Bush appointee on the 6th Circuit, and Laurence H. Silberman, a Reagan appointee on the D.C. Circuit, came down in favor of the administration during the battle over the law's “individual mandate,” which requires almost all Americans to hold health insurance or pay a penalty.

“Those guys are old school,” with a firm commitment to judicial restraint, said Randy E. Barnett, a professor at Georgetown University Law Center viewed as the leading legal light behind the challenge to the individual mandate.

Mr. Barnett said conservatives are starting to realize that such restraint does not always serve their interests.

Among Democratic appointees, the main exception was Judge Frank M. Hull, a Clinton appointee who ruled against the administration in the 11th Circuit case that led to Obamacare’s 2012 showdown before the Supreme Court.

Ultimately, conservatives were devastated when Chief Justice John G. Roberts Jr., appointed in 2005 by Mr. Bush, broke ranks from the other Republican-appointed justices and upheld the law’s individual mandate under Congress’ taxing authority.

Russell Wheeler, a visiting fellow at the Brookings Institution, said the chief justice may have weighed a persistent Republican-Democrat split over Obamacare.

“It’s hard to think that wasn’t at least on his mind,” he said.

Other legal scholars say Republican judges who rule against Obamacare reflect the anger that surrounds how the law was passed in 2010.

Democratic majorities had pushed bills through each chamber with no Republican support, meaning that when Republican Scott Brown won a special election to the Senate, Democrats no longer had the filibuster-proof majority in the upper chamber needed to pass a fully reconciled bill. Instead, they had to improvise and cut corners to get anything through.

“Now you’re crying to the courts, ‘Oh, we screwed up. Fix it for us,’” said David Bernstein, a law professor at George Mason University.

Americans got a perfect look at the political and ideological split just last month when the appeals court in the District of Columbia ruled that Obamacare can only pay subsidies in some states — on the same day that an appeals court in Richmond ruled the opposite way.

The D.C. case was 2-1, with two GOP-appointed judges ruling against Mr. Obama and a Democratic appointee ruling in its favor. The Richmond court panel, meanwhile, had three Democratic appointees, and all three ruled in favor of the Obama administration.

The rulings hinged on whether the law specifies whether subsidies could be paid to all residents or only to those in states that set up their own health exchanges rather than relying on the federal government.

Drafting error or otherwise, what should be a simple fix to a hastily passed law is not an option, as the Republican House majority still wants to repeal Obamacare outright.

“If the Affordable Care Act had been passed like the civil rights acts had been passed — with bipartisan support, and then with bipartisan support in the country — some judges [would] bend over backward to try to go along with that,” Mr. Barnett said.

Lawmakers on Capitol Hill recognize how closely appeals court rulings are tied to the parties that nominated the judges hearing the cases.

Senate Majority Leader Harry Reid, a Nevada Democrat furious at the way Republican-appointed judges were ruling, used the so-called “nuclear option” last year to change Senate rules and make it easier to confirm Mr. Obama’s appeals court nominations.

A chief target was the powerful D.C. appeals court, where Mr. Reid’s adding of three more Democrats could turn out to have shaped in advance the outcome of an en banc rehearing of the subsidies case.

With competing rulings, the cases are likely headed to the Supreme Court, and would be the third major Obamacare challenge to reach the justices.

In the most recent case, decided in June, five Republican-appointed justices struck down part of the administration’s contraceptive mandate, ruling that closely held corporations cannot be forced to pay for employees’ contraceptive coverage if the company owners have religious objections. The four Democratic-appointed justices had backed the administration.

But in a sign that judges aren’t always so closely tied to party affiliation, just four days earlier the court ruled unanimously that Mr. Obama’s recess appointments to the National Labor Relations Board were unconstitutional.

“When the case is easy,” Mr. Bernstein said, “you’ll get 9-0 opinions regardless of politics.”